Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES S. DEATON; REBECCA DEATON,
Defendants-Appellants,

THE CHESAPEAKE BAY FOUNDATION, INCORPORATED; STATE OF MARYLAND, DEPARTMENT OF THE ENVIRONMENT,
Amici Supporting Appellee.

No. 02-1442

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Marvin J. Garbis, District Judge.
(CA-95-2140-MJG)
Argued: December 5, 2002
Decided: June 12, 2003
Before WILKINSON, LUTTIG, and MICHAEL, Circuit Judges.

Affirmed by published opinion. Judge Michael wrote the opinion, in which Judge Wilkinson and Judge Luttig joined.

COUNSEL

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ON BRIEF: Virginia S. Albrecht, Stephen M. Nickelsburg, HUNTON & WILLIAMS, Washington, D.C.; Duane J. Desiderio, Thomas Jon Ward, NATIONAL ASSOCIATION OF HOME BUILDERS, Washington, D.C., for Appellants. Thomas M. DiBiagio, United States Attorney, Thomas L. Sansonetti, Assistant Attorney General, Greer S. Goldman, Ethan G. Shenkman, Environment & Natural Resources Division, UNITED STATES DEPARTMENT OF JUSTICE, Baltimore, Maryland, for Appellee. Roy A. Hoagland, Denise Stranko, THE CHESAPEAKE BAY FOUNDATION, INC., Annapolis, Maryland; Janice L. Goldman-Carter, Edina, Minnesota, for Amicus Curiae Foundation. J. Joseph Curran, Jr., Attorney General of Maryland, Adam D. Snyder, Assistant Attorney General, Baltimore, Maryland, for Amicus Curiae State.

OPINION

MICHAEL, Circuit Judge:

This is the second appeal by James and Rebecca Deaton, who were sued by the government under the Clean Water Act (sometimes, "the CWA" or "the Act"), 33 U.S.C. § 1251 *et seq.*, for failing to obtain a permit from the U.S. Army Corps of Engineers (the Corps) before digging a ditch and depositing excavated dirt in wetlands on their property. The Corps asserts jurisdiction because the Deatons' wetlands are adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay. The Deatons' main argument is that the Corps has no authority over the roadside ditch, and thus the agency cannot regulate their wetlands. First, we hold that Congress's power under the Commerce Clause to protect navigable

waters allows it to regulate the discharge of pollutants that flow into the ditch. Congress delegated part of this authority to the Corps in the Clean Water Act. The Corps, in turn, has promulgated a regulation, 33 C.F.R. § 328.3(a)(5), that extends CWA jurisdiction to tributaries of navigable waters. This regulation represents a reasonable interpretation of the CWA that is entitled to deference. The Corps interprets its regulation to cover the roadside ditch, and we also defer to that interpretation. Second, we hold that the district court did not err when it decided that the Corps used an appropriate indicator for wetland hydrology (prescribed by its Wetlands Delineation Manual) in designating parts of the Deatons' property as wetlands. Finally, we affirm the district court's remediation order, which requires the Deatons to fill in the ditch and restore their wetlands to their pre-violation condition.

I.

The Delmarva Peninsula separates the Chesapeake Bay from the Atlantic Ocean. Since 1989 the Deatons have owned an undeveloped, twelve-acre parcel of land located roughly in the center of the peninsula, near Parsonsburg in Wicomico County, Maryland. The parcel slopes gently downhill toward a county road, Morris Leonard Road. A drainage ditch runs alongside the road between the pavement and the Deatons' property. The Deatons call the ditch the "Morris Leonard Road ditch," while the Corps calls it the "John Adkins Prong of Perdue Creek." We will call it the "roadside ditch." The parties agree that surface water from the Deatons' property drains into the roadside ditch. They disagree about how much water flows through the ditch, and how consistent the flow is, but they agree on the ditch's course. Water from the roadside ditch takes a winding, thirty-two-mile path to the Chesapeake Bay. At

the northwest edge of the Deatons' property, the roadside ditch drains into a culvert under Morris Leonard Road. On the other side of the road, the culvert drains into another ditch, known as the John Adkins Prong of Perdue Creek. Perdue Creek flows into Beaverdam Creek, a natural watercourse with several dams and ponds. Beaverdam Creek is a direct tributary of the Wicomico River, which is navigable. Beaverdam Creek empties into the Wicomico River about eight miles from the Deatons' property. About twenty-five river miles further downstream, the Wicomico River flows into the Chesapeake Bay, a vast body of navigable water.

The Deatons bought the twelve-acre parcel for the purpose of developing a small (five-lot) residential subdivision. There was a problem, however, because much of the property was poorly drained. In particular, there was a large, low, wet area in the middle where water stood in the winter months and after heavy rainfall. Because of the drainage problem, the Wicomico County Health Department denied the Deatons' application for a sewage disposal permit. The Deatons then decided to dig a drainage ditch across the property. A technician from the U.S. Soil Conservation Service (SCS) advised Mr. Deaton, however, that a large portion of the property contained nontidal wetlands and that he would need a permit from the Corps before undertaking any ditching work. In early 1990 the Deatons, without seeking a Corps permit, hired a contractor who dug a 1,100-foot ditch that crossed the areas of the property identified as wetlands by the SCS technician. The contractor piled the excavated dirt on either side of the ditch, a practice known as sidecasting.

The Corps learned about the Deatons' ditching project in July 1990 and promptly initiated regulatory action. The

details are discussed in our prior opinion, *United States v. Deaton,* 209 F.3d 331, 333 (4th Cir. 2000). In short, the Corps issued a stop-work order to the Deatons, warning them that their placement of fill material in a wetland violated § 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a), and that no further work should be done without a permit. After a period of lengthy, but unsuccessful, negotiations with the Deatons, the government in 1995 filed a civil complaint alleging that the Deatons had violated the Clean Water Act by discharging fill material into regulated wetlands without a permit. The district court ultimately concluded in the first round that sidecasting did not constitute the discharge of a pollutant under the Act and granted summary judgment to the Deatons. We reversed, holding that "the Clean Water Act's definition of discharge as 'any addition of any pollutant to navigable waters' encompasses sidecasting in a wetland." *Deaton,* 209 F.3d at 337 (referring to 33 U.S.C. § 1362(12)). We remanded the case for further proceedings.

Not long after our remand order, the Supreme Court decided *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159 (2001) (*SWANCC*). *SWANCC* held that the Corps exceeded its statutory authority under § 404(a) of the Clean Water Act when it interpreted the Act (through 33 C.F.R. § 328.3(a)(3) and the Migratory Bird Rule, 51 Fed. Reg. 41,217 (1986)) to cover an isolated, intrastate gravel pit that was filled with water and used by migratory birds. *Id.* at 162-63, 174. Because *SWANCC* provides new guidance for analyzing the Corps's jurisdiction under the Clean Water Act, the Deatons filed a motion on September 10, 2001, asking the district court to reconsider the issue of CWA jurisdiction in this case.

The Deatons argued that under *SWANCC* the Clean Water Act cannot be read to extend Corps jurisdiction to their wetlands or the roadside ditch and that if the Act does extend that far, Congress exceeded its authority under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3. On January 29, 2002, the district court entered an order denying the motion to reconsider, holding (1) that the Deatons' wetlands are adjacent to the roadside ditch, which is a tributary of navigable waters, (2) that "[b]ecause there is a hydrologic connection between the Deaton wetlands and navigable waters," *SWANCC* does not bar CWA jurisdiction, and (3) that protecting the Deatons' wetlands is reasonably related to Congress's authority under the Commerce Clause to protect navigable waters as channels of commerce. Five days later, on February 4, 2002, the district court entered a remediation order directing the Deatons to restore their property "to its pre-violation condition and elevation." The Deatons appeal these orders.

II.

A.

The Deatons' appeal of the district court's order denying their motion to reconsider Clean Water Act (or Corps) jurisdiction presents a question of law that we review de novo. *See Meekins v. United Transp. Union,* 946 F.2d 1054, 1057 (4th Cir. 1991). We begin with the statutory and regulatory framework for Corps jurisdiction in this case. Section 404(a) of the Clean Water Act requires a permit issued by the Secretary of the Army, through the Corps of Engineers, for the discharge of fill material into "navigable waters." 42 U.S.C. § 1344(a), (d). The Act defines "navigable waters" as "waters of the United States, including the territorial seas." 42 U.S.C. § 1362(7). The Corps's jurisdictional regulations define

"waters of the United States" to include, among others, (i) traditional navigable waters, that is, "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce," 33 C.F.R. § 328.3(a)(1), (ii) tributaries of covered waters, including traditional navigable waters, *id.* § 328.3(a)(5), and (iii) wetlands adjacent to covered waters, including tributaries, *id.* § 328.3(a)(7). The Corps asserts jurisdiction over the Deatons' wetlands because they are adjacent to the roadside ditch, which is a tributary of the Wicomico River, a traditional navigable water.

In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Supreme Court upheld Corps regulations "requir[ing] permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States.'" *Id.* at 139. Several courts have held that *SWANCC* limited this holding to wetlands adjacent to traditional navigable waters. *E.g.*, *Rice v. Harken Energy Co.*, 250 F.3d 264, 268-69 (5th Cir. 2001); *United States v. RGM Corp*, 222 F.Supp. 2d 780, 785-86 (E.D. Va. 2002); *United States v. Newdunn Assocs.*, 195 F. Supp. 2d 751, 763, 767-68 (E.D. Va. 2002), appeal pending sub nom. *Treacy v. Newdunn Assocs.*, No. 02-1480(L) (4th Cir.); *United States v. Rapanos*, 190 F.Supp. 2d 1011, 1015-16 (E.D. Mich. 2002). The Deatons do not press for that limitation here. They argue instead that the roadside ditch is not covered by the Clean Water Act, which means that their wetlands are not adjacent to any covered water. As a result, the Deatons say, they did not need a permit to discharge fill material into their wetlands. It is undisputed that the Deatons' wetlands are adjacent to the roadside ditch. Thus, if the ditch is covered, so are the wetlands. Our analysis, then, will focus on whether the Corps has jurisdiction over the roadside ditch.

B.

The Deatons first argue that the Corps's tributaries regulation, which interprets the Clean Water Act to reach the roadside ditch, pushes the limits of Congressional authority under the Commerce Clause and thereby raises a serious constitutional question. According to the Deatons, Congress did not give a clear indication that it intended the Act to reach tributaries so far from navigable waters, and therefore we should avoid the question of whether regulation of the ditch is constitutional by holding that Congress did not authorize it under the Act. The Deatons argue in the alternative that even if Congress authorized the Corps's regulation of the roadside ditch under the CWA, that authorization is invalid because it exceeds Congress's power under the Commerce Clause. The Corps, of course, contends that its assertion of CWA jurisdiction over the roadside ditch through its tributaries regulation, 33 C.F.R. § 328.3(a)(5), represents a proper exercise of power granted to Congress by the Constitution and delegated to the Corps. For the reasons that follow, we hold that the CWA, as implemented by the Corps's regulation, fits comfortably within Congress's authority to regulate navigable waters.

The regulation reflects the Corps's interpretation of the CWA, and the Deatons' arguments require us to undertake a somewhat complicated analysis. The Deatons begin their first argument by saying that the Corps's regulation cannot survive the threshold analysis required by *SWANCC:* when "an administrative interpretation of a statute invokes the outer limits of Congress' power," the interpretation is not entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), unless Congress gave "a clear indication that [it] intended that result." *SWANCC,* 531 U.S. at 172

(citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council,* 485 U.S. 568, 575 (1988)). This requirement, the Court said, stems from a "prudential desire not to needlessly reach constitutional issues and [an] assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. Moreover, "[t]his concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 173. "Thus, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" *Id.* at 173 (quoting *DeBartolo,* 485 U.S. at 575).

SWANCC and *DeBartolo* must be read in light of *Rust v. Sullivan,* 500 U.S. 173 (1991). *See Williams v. Babbitt,* 115 F.3d 657, 661-63 (9th Cir. 1997) (comparing *DeBartolo* and *Rust*). In *Rust* the Supreme Court proceeded to decide the constitutionality of an agency's regulations because, while the constitutional arguments against the regulations had "some force," the arguments did not "raise the sort of grave and doubtful constitutional questions" that would require a clear indication from Congress that it intended to authorize the agency's interpretation. *Rust,* 500 U.S. at 191 (internal quotation marks and citation omitted). Thus, the Court said, it did not have to "invalidate the regulations in order to save the statute from unconstitutionality." *Id.* In sum, when "we do not face the sort of serious constitutional questions 'that would lead us to assume Congress did not intend to authorize [the regulation's] issuance,'" we may decide the constitutional question and proceed to the *Chevron* analysis. *Republican Nat'l Comm. v. Fed. Election*

Comm'n, 76 F.3d 400, 409 (D.C. Cir. 1996) (quoting *Rust*, 500 U.S. at 191).

Our initial task is to determine whether the constitutional question - does the Commerce Clause give Congress authority over the roadside ditch - is serious enough to warrant rejection of the Corps's regulation. The Commerce Clause of our Constitution grants Congress authority over three distinct spheres: "[1] the use of the channels of interstate commerce . . . [2] the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . [and 3] those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The activities regulated under the third category must be "economic in nature." *United States v. Morrison*, 529 U.S. 598, 613 (2000). *See also GDF Realty Invs., Inc. v. Norton*, 326 F.3d 622, 633-36 (5th Cir. 2003). Congress enacted the Clean Water Act under "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172. *See also id.* at 168 n.3. The power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce. *Gibbs v. Babbitt*, 214 F.3d 483, 490-91 (4th Cir. 2000) (including "navigable rivers, lakes, and canals" among the channels of commerce) (citation omitted); *United States v. Ballinger*, 312 F.3d 1264, 1269 (11th Cir. 2002).

Congress's power over the channels of interstate commerce, unlike its power to regulate activities with a substantial relation to interstate commerce, reaches beyond the regulation of activities that are purely economic in nature. The power to regulate channels of interstate commerce allows Congress to make laws that protect the flow of commerce. *See Heart of Atlanta Motel*,

Inc. v. United States, 379 U.S. 241, 257 (1964) (upholding congressional power to bar racial discrimination in hotels because this discrimination had a "disruptive effect . . . on commercial intercourse"); *United States v. Darby,* 312 U.S. 100, 114-15 (1941) (upholding congressional power to forbid interstate commerce in goods made by child labor because traffic in such goods encourages "competition . . . injurious to the commerce"). Some of the power exercised by Congress in enacting the Clean Water Act is grounded in the authority to protect the flow of commerce in "navigable waters as channels or instrumentalities of interstate commerce." *United States v. Wilson,* 133 F.3d 251, 256 (4th Cir. 1997). *See also United States v. Ashland Oil & Transp. Co.,* 504 F.2d 1317, 1325-26 (6th Cir. 1974) (noting hazards to navigation posed by pollution).

The Deatons argue that the power over navigable waters is limited to legislation aimed at protecting or encouraging navigation and the flow of commerce. However, the Supreme Court cases discussing congressional power over channels of interstate commerce make clear that this view is too narrow. Congressional power to regulate the use of commercial channels goes further: "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained . . . ." *Caminetti v. United States,* 242 U.S. 470, 491 (1917) (quoted in *Lopez,* 514 U.S. at 558). In *Caminetti* the Supreme Court held that the Mann Act, which barred the transport of "any woman or girl" in interstate channels for an "immoral purpose" was within congressional authority, even though the defendant's conduct - transporting a woman across state lines to "be and become his mistress and concubine" - was entirely noncommercial. *Id.* at 483, 485; *see also Perez v. United States,* 402 U.S. 146, 150 (1971) (acknowledging

congressional power to regulate "the use of channels of interstate . . . commerce which Congress deems are being misused"); *Heart of Atlanta Motel,* 379 U.S. at 256 (citing *Caminetti); cf. Ballinger,* 312 F.3d at 1270 ("Congress may regulate *any* instrumentality or channel of interstate commerce . . . ."); *United States v. Horton,* 321 F.3d 476, 481 n.3 (4th Cir. 2003) (reading federal kidnapping statute as exercise of congressional power to prevent "misuse" of channels of commerce by a kidnapper trying "to cover up his trail by moving evidence of his crime into a different state's jurisdiction"). *But cf. United States v. Abdullah,* 162 F.3d 897, 901 (6th Cir. 1998) (suggesting that a statute enacted under this authority must have as its purpose "to keep open the very avenues by which interstate commerce is transacted"). The Deatons are correct that many cases concerning the power over navigable waters focus on congressional authority to regulate in aid of navigation. *E.g., Gilman v. Philadelphia,* 70 U.S. (3 Wall.) 713, 724-25 (1866); *United States v. Appalachian Elec. Power Co.,* 311 U.S. 377, 404-05 (1940). But there is no reason to believe Congress has less power over navigable waters than over other interstate channels such as highways, which may be regulated to prevent their "immoral and injurious use[ ]." *Caminetti,* 242 U.S. at 491.

Congress's authority over the channels of commerce is thus broad enough to allow it to legislate, as it did in the Clean Water Act, to prevent the use of navigable waters for injurious purposes. *See Caminetti,* 242 U.S. at 491; *Lopez,* 514 U.S. at 558. For example, Congress may outlaw the use of navigable waters as dumping grounds for fill material. The power over navigable waters also carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters. *See*

Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 525-26 (1941); *United States v. Rio Grande Dam Irrigation Co.*, 174 U.S. 690, 708-09 (1899); *see also United States v. Grand River Dam Auth.*, 363 U.S. 229, 232 (1960). Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves. Indeed, the principle that Congress has the authority to regulate discharges into nonnavigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act. *See, e.g., Ashland Oil,* 504 F.2d at 1325-29; *cf. United States v. Hartsell,* 127 F.3d 343, 348-49 (4th Cir. 1997). The Deatons argue that their discharge (or sidecasting of dirt) into wetlands adjacent to the roadside ditch is too trivial to affect water quality in navigable waters. Congress, however, may decide that the aggregate effect of all of the individual instances of discharge, like the discharge by the Deatons, justifies regulating each of them. *See Wickard v. Filburn,* 317 U.S. 111 (1942). And if Congress itself has the authority to make that decision, it may delegate it to the Corps, as long as it provides an "intelligible principle" to guide the agency's decisionmaking. *See, e.g., J. W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 409 (1928); *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 218-24 (1989); *see also Darby,* 312 U.S. at 120-21. Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and gave the Corps, along with the Environmental Protection Agency, the job of getting this done. The Corps has pursued this goal by regulating nonnavigable tributaries and their adjacent wetlands. This use of delegated authority is well within Congress's traditional power over navigable waters.

It follows that under the Corps's interpretation, the Clean Water Act does not invade an area of authority reserved to the states. The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers. "Although States have important interests in regulating . . . natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated powers . . . ." *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 204 (1999). *Cf. Gibbs,* 214 F.3d at 499-501 (concluding that the application of the Endangered Species Act to private land does not unconstitutionally interfere with local power over land use or wildlife); *GDF Realty Invs.,* 326 F.3d at 639 (same). The federal decision to regulate the discharge of pollutants into tributaries of navigable waters does not "significantly change[ ] the federal-state balance." *See United States v. Bass,* 404 U.S. 336, 349 (1971).

In sum, the Corps's regulatory interpretation of the term "waters of the United States" as encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power or alter the federal-state framework. The agency's interpretation of the statute therefore does not present a serious constitutional question that would cause us to assume that Congress did not intend to authorize the regulation. Indeed, as our discussion of Congress's Commerce Clause authority makes clear, the federal assertion of jurisdiction over nonnavigable tributaries of navigable waters is constitutional.

C.

The thrust of the Deatons' final argument about the

Corps's jurisdiction is this: even if the Corps could regulate the roadside ditch without causing a constitutional problem, neither the Clean Water Act nor the Corps's regulation extends coverage to the ditch. Here, the Deatons make a two-part argument. First, they argue that even if the Act authorizes the Corps to regulate the nonnavigable tributaries of navigable waters, the roadside ditch is not such a tributary. They say that the ditch does not meet the definition of "tributary" at all or, alternatively, it is not a tributary *of* a navigable water because water flowing from the ditch must pass through several other nonnavigable watercourses before reaching the navigable Wicomico River. In short, the Deatons are arguing here that the Corps is misinterpreting its own regulation by using the tributaries provision, 33 C.F.R. § 328.3(a)(5), to assert jurisdiction over the roadside ditch. Second, they argue that if the tributary regulation does cover the ditch, the regulation is an unreasonable interpretation of the CWA. We hold that we should defer to the Corps's interpretation of its regulation to include the ditch and that the regulation, read this way, is a reasonable interpretation of the Clean Water Act.

This finally brings us to *Chevron,* and we analyze the Deatons' statutory and regulatory coverage arguments as follows. We begin with the first step of the *Chevron* analysis, *see* 467 U.S. at 842, and determine whether the Clean Water Act delegates authority to the Corps to decide whether to regulate nonnavigable tributaries. Specifically, we ask "whether Congress has directly spoken to the precise question at issue." *Id.* When Congress has not spoken directly, but instead has been "silent or ambiguous" on the issue, it has by implication delegated authority to the agency charged with administering the statute, allowing the agency to clarify the ambiguity or fill the gap. *Id.* at 843-45. *See also*

Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996). If we conclude that the statute is silent or ambiguous, we normally move directly to the second step in the *Chevron* analysis, *see* 467 U.S. at 843, and determine whether the agency's regulation reflects a reasonable construction of the statute, *id.*

In this case, however, we are sidetracked by another issue: the meaning of the regulation itself. The Corps interprets its regulation to cover the roadside ditch, but the Deatons contend that the Corps's interpretation cannot be squared with the words of the regulation. As a result of this dispute, we must, before proceeding to *Chevron's* step two, determine what the regulation actually means. *Kentuckians for the Commonwealth v. Rivenburgh,* 317 F.3d 425, 439 (4th Cir. 2003). We give "controlling weight" to an agency's interpretation of its own regulation, "unless [the interpretation] is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945). *See also Auer v. Robbins,* 519 U.S. 452, 461 (1997); *Kentuckians,* 317 F.3d at 439; *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 221 (4th Cir. 1997). If the regulation is unambiguous, then what is known as *Seminole Rock* deference does not apply, and the regulation's plain language, not the agency's interpretation, controls. *Christensen v. Harris County,* 529 U.S. 576, 588 (2000). Once we have determined what the regulation means, we can move on to the second step of *Chevron,* 467 U.S. at 843, and decide whether the regulation is based on a reasonable construction of the statute. *See Kentuckians,* 317 F.3d at 439-40 (combining use of *Seminole Rock* and *Chevron* tests).

We turn to the initial question of whether the statute is ambiguous. If Congress has "spoken to the precise

question at issue," there is no ambiguity and thus no room for the agency interpretation. *Chevron,* 467 U.S. at 842-43. The precise question here is whether the Clean Water Act extends to distant, nonnavigable tributaries of navigable waters. Section 404(a) of the CWA regulates discharges into "navigable waters," 42 U.S.C. § 1344(a), and the Act defines "navigable waters" as "waters of the United States," *id.* § 1362(7). The Corps's regulations interpret the term "waters of the United States." If Congress had stopped with the basic term "navigable waters," the term used in § 404(a), 42 U.S.C. § 1344(a), many years of judicial precedent would give us the following clear meaning: "[waters] are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871). *See also Appalachian Elec. Power Co.,* 311 U.S. at 404-10. In the Clean Water Act Congress elected to redefine "navigable waters," moving away from the traditional definition. Its choice of the expansive phrase "waters of the United States" indicates an intent to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview,* 474 U.S. at 133.

SWANCC, of course, emphasizes that the CWA is based on Congress's power over navigable waters, suggesting that covered nonnavigable waters are those with some connection to navigable ones. *See SWANCC,* 531 U.S. at 167, 172. But we cannot tell from the Act the extent to which nonnavigable tributaries are covered. The statutory term "waters of the United States" is sufficiently ambiguous to constitute an implied delegation of authority to the Corps; this authority permits the Corps to determine

which waters are to be covered within the range suggested by *SWANCC. See Chevron*, 467 U.S. at 843 ("'The power of an administrative agency to administer a congressionally created . . . program necessarily requires . . . the making of rules to fill any gap left . . . by Congress.'") (quoting *Morton v. Ruiz,* 415 U.S. 199, 231 (1974)).

We next look for the meaning of the regulation promulgated under this delegated authority. Before deferring to the agency interpretation under *Seminole Rock,* we first decide whether the regulation is ambiguous. *Christensen,* 529 U.S. at 588. The regulation, 33 C.F.R. § 328.3(a)(5), defines "waters of the United States" to include tributaries of navigable waters. The Deatons argue that it is wrong to read the regulation to reach all branches of a system that eventually flow into a navigable waterway. They contend that the term "tributary" in the regulation refers only to a nonnavigable branch that empties directly into a navigable waterway. Thus, they say, the roadside ditch is not a tributary of the navigable Wicomico River. We must decide whether this issue is settled by the plain language of the regulation.

Webster's Third New International Dictionary (1993) defines "tributary" as (1) "providing with or serving as a channel for supplies or additional matter" or (2) "one that is tributary to another: as . . . a stream." According to this definition, "tributary" in the regulation would encompass the entire feeder system for a navigable water because even a stream many branches away eventually provides "additional matter" for the navigable water. On the other hand, *Webster's II New Riverside University Dictionary* (1988) defines tributary as "[a] river or stream flowing into a larger river or stream." Under this definition a watercourse like the roadside ditch appears to be a tributary, but it is not clear that it would be a tributary *of* a

larger river several branches downstream. It could be read to mean that only streams flowing directly into a larger river are the larger river's tributaries. The dictionaries thus agree that the roadside ditch is a tributary, but they do not settle the question of whether it is a tributary of a navigable water (here, the Wicomico River), which is what the regulation covers. "The existence of alternative dictionary definitions of the word '[tributary],' each making some sense under the [regulation], itself indicates that the [regulation] is open to interpretation." *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992). We conclude that the regulation is ambiguous on the question of how far the coverage of tributaries extends. We therefore turn to the agency's interpretation.

The Corps asserts in its brief that "tributaries" in the regulation means "all tributaries, "not just" 'short' or 'primary' tributaries." Appellee's Br. at 37. In the preamble to a prior generation of CWA regulations, the agency wrote that "Corps *jurisdiction* . . . would extend to ... all tributaries (primary, secondary, tertiary, etc) of navigable waters." 40 Fed. Reg. 31,320 (1975) (emphasis added). As the Deatons point out, these old regulations cut off Corps jurisdiction at the "headwaters" of a tributary, defined by a minimum water flow that the roadside ditch would not meet. *Id.* at 31,321, 31,324. But we are concerned here with the definition of the word "tributary." Although the Corps has not always chosen to regulate all tributaries, it has always used the word to mean the entire tributary system, that is, all of the streams whose water eventually flows into navigable waters. *Cf. Headwaters, Inc. v. Talent Irrigation Dist.* 243 F.3d 526, 533 (9th Cir. 2001) (considering "tributary" to reach all branches of a system without referring to Corps's interpretation). Because the Corps's longstanding interpretation of the word "tributary" has support in the dictionary and

elsewhere, it is not plainly erroneous. Nor is it inconsistent with the regulation. The interpretation is therefore entitled to *Seminole Rock* deference. In short, the word "tributaries" in the regulation means what the Corps says it means.

Now that we know the meaning of the regulation - jurisdiction extends to any branch of a tributary system that eventually flows into a navigable body of water - we can proceed to step two of the *Chevron* inquiry: is the regulation "based on a permissible construction" of the Clean Water Act. *Chevron,* 467 U.S. at 843. The Deatons rely on a passage from *SWANCC* to assert that the Corps's current jurisdictional interpretation cannot be reasonable. In *SWANCC* the Supreme Court said that the Corps had "put forth no persuasive evidence that [it] mistook Congress' intent" when it promulgated the first set of CWA regulations in 1974, shortly after the Act was passed. *SWANCC,* 531 U.S. at 168. The first regulations were narrow, reaching only navigable waters. *See* 39 Fed. Reg. 12,115, 12,119 (1974).

We do not read *SWANCC* to hold that the 1974 regulations represent the only permissible interpretation of the Clean Water Act. Those regulations captured what *SWANCC* holds to be Congress's general intent in enacting the CWA, that is, to exercise its power over navigable waters for the purpose of protecting their chemical, physical, and biological integrity. *See SWANCC,* 531 U.S. at 166, 172 (citing 33 U.S.C. § 1251(a)). In the case before us, however, our conclusion in step one of the *Chevron* inquiry - that the CWA is ambiguous when it comes to jurisdictional coverage - shows that Congress intended to delegate authority to the Corps to decide how far coverage must extend in order to protect the navigable waters. We defer to an agency's

reasonable interpretation not because the agency is in a better position to know what Congress really wanted, but "because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley,* 517 U.S. at 740-41. Over the years, the Corps's understanding of the best way to exercise its discretion under the CWA has evolved. *See Newdunn Assocs.,* 195 F. Supp. 2d at 759-62 & n.8 (detailing changes to Corps's CWA jurisdictional regulations through revisions and interpretations in 1974, 1975, 1977, 1982, 1986, and 1990).

To conclude that the Corps's current interpretation is reasonable, "we need not find that [its interpretation] is the only permissible construction . . . but only that [the agency's] understanding of this . . . statute is a sufficiently rational one to preclude a court from substituting its judgment for [the agency's]." *Chem. Mfrs. Ass'n v. Natural Res. Def. Council, Inc.,* 470 U.S. 116, 125 (1985) (quotation marks omitted). An agency is allowed to change its mind, so long as its new interpretation is reasonable. *Smiley,* 517 U.S. at 742. In other words, "the mere fact that an agency interpretation contradicts a prior agency position is not fatal." *Id. See also Rust,* 500 U.S. at 186-87; *Chevron,* 467 U.S. at 863-64; *United States v. Mead Corp,* 533 U.S. 218, 247 (2001) (Scalia, J., dissenting) ("Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification."); *Piney Mtn. Coal Co. v. Mays,* 176 F.3d 753, 766-67 (4th Cir. 1999); *Mass. v. FDIC,* 102 F.3d 615, 621 (1st Cir. 1996). There is no suggestion that the Corps's current interpretation represents a "[s]udden and unexplained change" or that it "does not take account

of legitimate reliance on prior interpretation." *Smiley*, 517 U.S. at 742 (citing *Motor Vehicle Mfrs. Ass'n of United States, Inc v. State Farm Mut. Auto. Ins. Co*, 463 U.S. 29, 46-57 (1983); *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 670-75 (1973); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)).

Accordingly, if the Corps's current interpretation, 33 C.F.R. § 328.3(a)(5), is based on a reasonable construction of the statute, we will defer to the Corps. We conclude that deference is appropriate. In *Riverside Bayview* the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what *SWANCC* described as "the significant nexus between the wetlands and 'navigable waters.'" *SWANCC*, 531 U.S. at 167. There is also a nexus between a navigable waterway and its nonnavigable tributaries. The Corps argues, with supporting evidence, that discharges into nonnavigable tributaries and adjacent wetlands have a substantial effect on water quality in navigable waters. The Deatons do not suggest that this effect is overstated. This nexus, in light of the "breadth of congressional concern for protection of water quality and aquatic ecosystems," *Riverside Bayview*, 474 U.S. at 133, is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. The regulation, as the Corps reads it, reflects a reasonable interpretation of the Clean Water Act. The Act thus reaches to the roadside ditch and its adjacent wetlands.

III.

The Deatons next argue that the district court erred when it held that the Corps used a correct indicator for wetland hydrology (taken from its Wetlands Delineation Manual) in designating parts of their property as wetlands.

The Corps's underlying wetlands regulation, which the Deatons do not challenge, defines wetlands as "areas that are inundated or saturated by surface or ground water" and are home to "vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b). To assist in applying this regulation, the Corps uses its Wetlands Delineation Manual, known as the 1987 Manual. *See* Waterways Experiment Station, Dep't of the Army, Corps of Engineers Wetlands Delineation Manual (1987). According to the manual, wetlands have "general diagnostic environmental characteristics" in the following three categories: vegetation, soil classification (hydric), and hydrology. 1987 Manual at 13-14. The Deatons do not dispute that their property meets the vegetation and soil criteria. However, they claim that their property lacks the required hydrology.

The 1987 Manual lists several methods for determining an area's hydrology, ranking them by reliability. *Id.* at 37-41. Using recorded data on water levels, flooding, and soil saturation is the most reliable method. Using field data is next. *Id.* Among the acceptable ways of gathering field data, the second most reliable is "[v]isual observation of soil saturation," which involves digging a hole in the soil and observing water levels. In order to influence the characteristics of vegetation (and meet the wetlands hydrology criterion), water must saturate the soil "within a major portion of the root zone (usually within 12 inches of the surface)." *Id.* The Corps determined that the Deatons' property met the hydrology requirement by using the manual's visual observation method and finding that the soil was saturated to within twelve inches of the surface. The Deatons conducted their own observations, using twenty-two wells to monitor and record groundwater levels for several months. According to the Deatons, their study confirms that the areas in question were not

saturated *to the surface* for a sufficient time to be considered wetlands. The Deatons rely on certain language in the manual describing wetlands hydrology as soil "saturation to the surface at some time during the growing season." 1987 Manual at 34. They therefore argue that the observation-based data showing soil saturation within twelve inches of the surface does not permit a wetlands classification and that the Corps misinterpreted the manual in making the classification. The Corps's wetlands classification, however, did not involve an interpretation (or misinterpretation) of the manual. The "within twelve inches" indicator is spelled out in the manual, and the Corps simply found this indicator to be present.

The analysis of the Deatons' attack on the Corps's reliance on the "saturation within twelve inches of the surface" indicator must begin with the Corps's wetlands regulation. Again, the regulation, 33 C.F.R. § 328.3(b), defines wetlands to include areas that are "saturated by surface or ground water." The 1987 Manual interprets the regulation. The manual states that areas with wetland hydrology include those where "soils [are] saturated to the surface at some time during the growing season." 1987 Manual at 34. The manual also states that wetland hydrology is present where the saturation has "an overriding influence on characteristics of vegetation." *Id.* Saturation to within twelve inches of the surface is usually sufficient to have an overriding impact on vegetation, according to the manual. *Id.* at 38. Finally, the presence or absence of the "within twelve inches" indicator may be determined by visual observation. *Id.* Here, the Corps simply used the manual's prescribed criterion (the "within twelve inches" indicator) and methodology (visual observation) in determining that the Deatons' property had the required hydrology for wetlands designation. If

the Deatons want to argue that the "within twelve inches" criterion is inappropriate, they must argue that the manual is a flawed interpretation of the regulation defining wetlands. The Deatons, however, do not argue that the manual "is plainly erroneous or inconsistent with" the regulatory definition of wetlands. *See Seminole Rock*, 325 U.S. at 413-14. We are therefore bound to defer to the manual's interpretation of the regulation, *id.*, especially since the interpretation deals in a complex scientific field, wetlands ecology and hydrology. *Cf. Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991) (finding particular reason to extend *Chevron* deference when an agency administers a "complex and highly technical regulatory program").

IV.

Finally, the Deatons challenge the District Court's remedial order requiring them to fill in the ditch they dug across their property. The Clean Water Act only regulates the deposit of the material dug out of the ditch, not the digging itself. Therefore, the Deatons argue, requiring them to haul the deposited dirt to a non-wetland part of the property is the proper remedy. According to the Deatons, they would not have needed a permit if they had hauled the dirt away when they dug the ditch, so the remedy for their failure to get a permit should go no further than requiring them to do what would have been lawful in the first place.

We review the scope of a remediation order for abuse of discretion. *See Dixon v. Edwards*, 290 F.3d 699, 718 (4th Cir. 2002); *see also Sasser v. Adm'r, United States EPA*, 990 F.2d 127, 130 (4th Cir. 1993). In evaluating remediation or restoration proposals, courts have considered three factors: (1) whether the proposal "would confer maximum environmental benefits," (2) whether it

is "achievable as a practical matter," and (3) whether it bears "an equitable relationship to the degree and kind of wrong it is intended to remedy." *United States v. Cumberland Farms of Conn., Inc.*, 826 F.2d 1151, 1164 (1st Cir. 1987). *See also United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1301 (5th Cir. 1976) (Rivers and Harbors Act case); *United States v. Bradshaw*, 541 F. Supp. 884, 885 (D. Md. 1982). Although the district court did not consider each of these factors explicitly, it generally covered them. The court found that allowing the Deatons to haul the dirt away instead of filling the ditch would let them benefit from their violation of the Clean Water Act. Moreover, the court found it "doubtful that [removing the sidecast dirt] could be done in an ecologically harmless manner." In other words, the district court found that the Deatons' remediation proposal would likely compound the environmental damage they had already done. In light of these findings and the Clean Water Act's goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), we conclude that the district court did not abuse its discretion in entering the remediation order.

V.

We affirm the district court's order of January 29, 2002, denying the Deatons' motion to reconsider the issue of Clean Water Act jurisdiction and that court's order of February 4, 2002, requiring remediation.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
Plaintiff	*	
vs.	*	CIVIL ACTION NO. MJG-95-2140
JAMES S. DEATON, et al.	*	
Defendants	*	

* * * * * * * * * *

MEMORANDUM AND ORDER

The Court has before it the Defendants' Post Remand Motion to Reconsider the Issue of Clean Water Act Jurisdiction, the remaining penalty and remedy issues, and the materials submitted by the parties related thereto. The Court has held a hearing, including a site observation visit, and has had benefit of the arguments of counsel.

I. PROCEDURAL BACKGROUND

This action was brought by the United States ("the Government") against James and Rebecca Deaton ("the Defendants" or "the Deatons") under §§ 301(a) and 404 of the Clean Water Act ("the Act"). 33 U.S.C. §§ 1311(a), 1344.

On September 27, 1997, this Court issued a Corrected[1] Memorandum and Order ("Corrected M&O") granting in part the Government's Motion for Summary Judgment. A critical issue presented was whether sidecasting on jurisdictional wetlands constituted the discharge of a pollutant into a water of the United States

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[1] The parties' agreed changes to a September 10, 1997 Memorandum and order were accepted by the Court.

within the meaning of the Clean Water Act. The Court decided that such sidecasting does amount to the discharge of a pollutant under the Act.

On December 23, 1997, the United States Court of Appeals for the Fourth Circuit decided United States v. Wilson, 133 F.2d 251 (4th Cir. 1997), which addressed, but did not resolve, the sidecasting issue. Judge Niemeyer, who wrote the opinion for a three-judge panel, included in his decision a section concluding that sidecasting on jurisdictional wetlands did not constitute the addition of a pollutant to a water of the United States. 133 F.3d 251, 258 (4th Cir. 1997). District Judge Payne expressly disagreed, stating that in his view sidecasting did amount to a discharge of pollution. The third judge on the panel, Judge Luttig, did not address the issue at all.

On June 23, 1998, this Court issued a Memorandum and Order Re: Impact of Wilson stating that it agreed with Judge Payne, but predicted that the Fourth Circuit would adopt the position expressed by Judge Niemeyer. Thus, the Court held that sidecasting was not the discharge of a pollutant and granted summary judgment to the Defendants. Judgment was entered for the Defendants on June 23, 1998. The Government timely appealed. The Defendants cross-appealed, claiming that this Court lacked jurisdiction over the case.

On April 7, 2000, the Fourth Circuit issued its decision on the Government's appeal. In United States v. Deaton, 209 F.3d 331 (4th Cir. 2000), the appellate court resolved the issue left open in Wilson and held that sidecasting did amount to a discharge of pollution, that is the addition of a pollutant. The appellate court decided, in light of the decision on the sidecasting issue, that it would remand the case for further proceedings and not address the issues presented by the cross-appeal.

On remand, the case proceeded with respect to penalty and remedy issues. However, on January 9, 2001, the Supreme Court issued its decision in Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs ("SWANCC"), 531 U.S. 159 (2000), holding that the Corps of Engineers had exceeded its jurisdiction in seeking to regulate certain wetlands. The Defendants filed the instant Motion to Reconsider to seek dismissal of the case for lack of jurisdiction in reliance upon the SWANCC decision.

The parties have presented further evidence, including a site inspection before the Court, with regard to the penalty and remedy issues remaining in the case.

II. JURISDICTION

A. Factual Summary

On June 1, 1989, Defendants James and Rebecca Deaton purchased parcel 117 on Wicomico County Tax Map 31 ("the Parcel") for the purpose of developing a small, residential subdivision. The Parcel is located on Morris Leonard Road near Parsonsburg in Wicomico County, Maryland. In 1990, James Deaton hired a contractor to excavate a drainage ditch on the property. The Defendants do not dispute that part of the Parcel on which the excavation occurred contains wetlands. Nor do they dispute that they conducted sidecasting, i.e. redepositing excavated indigenous materials, on those wetlands, which, if done on jurisdictional wetlands is considered discharging a pollutant under the Act. See Deaton, 209 F.3d 331. The Defendants do dispute, however, that the Parcel includes wetlands that are "waters of the United States" within the meaning of the Act and regulations promulgated thereunder such that the Corps has jurisdiction to regulate them.

B. Discussion

Section 301 (a) of the Act prohibits the discharge of any pollutant, including dredged or fill material, into navigable waters. 33 U.S.C. § 1311(a). As discussed herein, the terms "navigable waters" and "waters of the United States", which are used interchangeably in the statute, are terms of art. Id. § 1362 (7). Under § 404, the Army Corps of Engineers ("the Corps") is authorized to issue permits for discharges of fill material into waters of the United States. Id. § 1344. A discharge without a permit violates § 301(a). Id. § 1311(a). In the instant case, the Defendants, by virtue of the sidecasting of materials from the drainage ditch, discharged fill material into wetlands on the Parcel without a permit. The question presented is whether the wetlands on the Parcel are "waters of the United States."

The Corps' regulations interpreting the Act define "waters of the United States", in pertinent part, as waters, or tributaries of waters, which are used in interstate commerce, including all waters which are subject to the ebb and flow of the tide ("tidal waters"). 33 C.F.R. § 328.3(a)(1), (5). Also included in the definition of waters of the United States are wetlands adjacent to tidal or navigable waters or their tributaries. Id. § 328.3(a)(7). Section (b) of the regulations defines wetlands and section (c) defines "adjacent" as:

> [B]ordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

Id. § 328.3(c).

In the Corrected M&O issued September 27, 1997, this Court held that the wetlands on the Deaton Parcel were waters of the United States within the meaning of the Act by virtue of being adjacent to navigable waters. Corrected M&O at 21. The Court stated:

> Ultimately, it is the surface water connection between the Deaton Parcel and the Chesapeake Bay that makes the discharge of pollutants into wetlands on the property a question of federal concern. It is this surface connection that makes any wetlands on the Deaton Property contiguous with, and therefore adjacent to, waters of the United States within the meaning of 33 C.F.R. § 328.3.

Id.

Defendants contend that the Supreme Court decision in SWANCC, 531 U.S. 159 (2001), restricting the Corps' jurisdiction under the Clean Water Act warrants reconsideration of this Court's previous determination that the Corps has jurisdiction over the Parcel. The Defendants also contend that the Fourth Circuit's decision in United States v. Wilson, 133 F.3d 251 (4th Cir. 1997), insofar as it refers to the jurisdictional issue, also requires reconsideration of this Court's decision. Finally, the Defendants contend that United States v. Morrison, 529 U.S. 598 (2000), casts doubt on the Constitutionality of the determination that the Corps has jurisdiction over the Parcel.

1. SWANCC

In SWANCC, the Supreme Court examined 33 C.F.R. § 328.3(a)(3) and the Migratory Bird Rule, 51 Fed. Reg.

41217 (1986). Section 328.3(a)(3) expands the definition of navigable waters under the Clean Water Act, in pertinent part, to include "[a]ll other waters such as intrastate lakes, rivers . . . [and] wetlands . . . , the use, degradation or destruction of which could affect interstate or, foreign commerce." Id. Pursuant to this provision, the Corps developed the Migratory Bird Rule, which further extended the definition of navigable waters to include intrastate waters used as habitat by migratory birds. 51 Fed. Reg. 41217.

In SWANCC, the Corps sought to exercise jurisdiction in reliance on this rule over wholly intrastate, isolated ponds frequented by migratory birds. 531 U.S. 159. The Supreme Court held that the Migratory Bird Rule exceeded the permissible reach of Congress' jurisdiction under the Commerce Clause. Id. at 174. Specifically, the SWANCC Court very narrowly held:

> 33 C.F.R. § 328.3 (a)(3)(1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed. Reg. 41217 (1986), exceeds the authority granted to [the Corps] under § 404(a) of the CWA.

Id.

As the Defendants themselves point out, SWANCC addressed only § 328.3(a)(3). Defs.' Mem. Supp. Recons. at 11, n.9 ("Defs.' Mem."). Unlike SWANCC, jurisdiction over the Defendants' Parcel in the instant action is exercised pursuant to § 328.3 (a)(1), (5), and (7), (b), and (c), which state, in pertinent part:

> (a) The term "waters of the United States" means
> (1) All waters which are currently

> used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> . . .
>
> (5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;
>
> . . .
>
> (7) Wetlands adjacent to waters . . . identified in paragraphs (a)(1)-(6) of this section.
>
> (c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

33 C.F.R. § 328.3. The essence of the Defendants' argument seems to be their contention that the SWANCC determination regarding a § 328.3(a)(3) water could be made with respect to (a) (5) waters and (a) (7) wetlands. Defs.' Mem. at 11, n.9. However, neither the Supreme Court nor the Fourth Circuit has made such a determination.

Moreover, there is strong dicta in SWANCC suggesting the Supreme Court would not accept such an argument if presented with the question involved in the instant case. The SWANCC Court discussed in considerable detail the holding in United States v. Riverside Bayview Homes, 474 U.S. 121 (1985), a case in

which the Court held the Corps had jurisdiction over wetlands directly adjacent to a navigable waterway. SWANCC, 531 U.S. at 167. The Supreme Court in SWANCC noted both that it did not, in Riverside Bayview, address whether the Corps would have jurisdiction over wetlands not immediately adjacent to open water, and that it need not address this question in SWANCC because the isolated water at issue was in no way connected to navigable waters. While stating that Congress' jurisdiction under the Act was not without limits, the Court cited with approval its finding in Riverside Bayview that Congress intended a broader, though not limitless, construction than the literal meaning of the word "navigable". SWANCC, 531 U.S. at 171 (citing Riverside Bayview, 474 U.S. at 133).

The Court found that this construction could not be so broad as to include the wholly intrastate pond used by migratory birds but left open the question of whether it might include wetlands not directly adjacent to navigable waters. Id. at 170-71. As one federal district court interpreting SWANCC put it:

> SWANCC does not reach the question of whether, on a basis other than being visited by migratory birds, isolated wetlands may fall under the definition of navigable waters/waters of the United States. It makes clear that it is still the rule that a nonnavigable (in the traditional sense) wetland directly adjacent to a navigable body of water falls within the purview of the [Act], and that an isolated wetland being visited by migratory birds is not enough to bring the wetland within the purview of the [Act]. SWANCC does not clarify at what

> points between those two extremes a nonnavigable body of water falls within the [Act's] definition of navigable waters.

United States v. Krilich, 152 F.Supp.2d 983, 988 (N.D.Ill. 2001) (citations omitted). Regardless of where the dividing line between those two extremes will ultimately drawn, the SWANCC decision addresses only jurisdiction derived from 33 C.F.R. § 328.3 (a) (3), not § 328.3(a)(1), (5), and (7). Thus, SWANCC is not a change in decisional law with respect to jurisdiction in the instant action, and it therefore provides no basis for the Court to change its previous decision on jurisdiction.

Even if jurisdiction in this case were derived from § 328.3(a)(3), it is still not clear that SWANCC would amount to a change in decisional law. The Defendants broadly assert that SWANCC invalidated § 328.3(a)(3). Defs.' Mem. at 7. However, the narrow holding of SWANCC quoted above appears to invalidate only the Migratory Bird Rule (which was derived from § 328.3(a)(3)) rather than § 328.3(a)(3) itself.[2] Because there is a hydrologic connection between the Deaton wetlands and navigable waters, jurisdiction over the Defendants' Parcel would in no way depend on the Migratory Bird Rule.

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[2] There is no general consensus as to the status of § 328(a)(3) after SWANCC. See, e.g., Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001) (SWANCC "invalidated a 1986 Army Corps of Engineers promulgation known as the 'Migratory Bird Rule'."); United States v. Buday, 138 F. Supp. 2d 1282, 1287 (D. Mont. 2001) ("Even though the [SWANCC] Court did not strike any part of 33 C.F.R. § 328 (a) (3), the decision raises serious questions about the continued viability of that subsection."); United States v. Interstate Gen. Co., 152 F. Supp. 2d 843, 846 (D. Md. 2001) (SWANCC essentially invalidated 33 C.F.R. § 328 (a) (3)).

Thus, the SWANCC Court's invalidation of the Rule would not control jurisdiction over the Deaton wetlands even if such jurisdiction were derived from 33 C.F.R. § 328.3 (a) (3). Again, as the Krilich court put it:

> To the extent there is a basis for the government to contend that the wetlands are not isolated, a colorable basis for [Clean Water Act] regulation continues to exist. Cases subsequent to SWANCC have not limited the definition of waters of the United States to those immediately adjacent to navigable (in the traditional sense) waters.

152 F.Supp.2d 983 at 992, n.13.

Indeed, the language used by the SWANCC Court indicates that it did not intend for the holding to have a broad reach. 531 U.S. 159. For example, in holding that the respondents had not presented evidence sufficient to support the validity of the Migratory Bird Rule, the Court stated that the respondents had produced no persuasive evidence "[b]eyond Congress' desire to regulate wetlands adjacent to 'navigable waters' . . . ". Id. at 170-71. Notably, the Court said neither directly abutting nor adjacent to open waters. The Supreme Court, well aware of the broader than literal meanings "adjacent" and "navigable" have under the Act, presumably would not have used such language had it intended its holding to restrict the Corps' jurisdiction under the Act to wetlands directly abutting open waters.

While there are no controlling cases interpreting SWANCC, other courts have declined to extend SWANCC beyond its narrow holding. For example, in United States v. Interstate Gen. Co., 152 F.Supp.2d 843

(D.Md. 2001), which is the latest incarnation of the Wilson case[3], a district court within the Fourth Circuit expressly declined to construe SWANCC as barring jurisdiction over wetlands very similar to those involved in the instant action. Like the Deatons, the Interstate defendants argued that SWANCC amounted to a change in controlling law requiring the court to reconsider whether the Corps had jurisdiction over their wetlands that were connected to the Potomac River by a six-mile network of streams and creeks. 152 F.Supp.2d at 846. The court found the defendants' reading of SWANCC overly broad and held:

> The SWANCC case is a narrow holding in that only 33 C.F.R. § 328(a)(3), as applied to the Corps creation of the Migratory Bird Rule, is invalid . . . . Because the Supreme Court reviewed only 33 C.F.R. § 328 (a)(3), it would be improper for this Court to extend the SWANCC Court's ruling any further than they clearly intended.

Id. at 847.

Other courts have taken a similarly narrow view of SWANCC. In United States v. Rueth Dev. Co., the defendants sought to modify a consent decree entered into following a determination that they violated the Clean Water Act by dredging without a permit on their non-tidal wetlands. No. 2:96-CV-540 (N.D.Ind. Sept. 25, 2001) (order, inter alia, denying motion to reconsider). Like the Deatons, the Rueth defendants argued in support of their motion for reconsideration that in light of SWANCC, the

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[3] After being resolved by a criminal guilty plea and a civil consent decree, Wilson is again on appeal before the Fourth Circuit sub nomine United States v. Interstate Gen. Co.

Corps lacked jurisdiction over their wetlands. Id. at 4. On facts very similar to the instant action, the Rueth court found that SWANCC did not constitute a change in decisional law because:

> There are two fundamental factual differences between Defendants' Site and the real property at issue in SWANCC. First, Defendants' Site is home to a natural wetland which flows into connecting bodies of water. In SWANCC, the bodies of water at issue were isolated mining pits and ponds. In other words, a molecule of water residing in one of these pits or ponds could not mix with molecules from other bodies of water. At Defendants' Site, however, water molecules currently present in the wetlands will inevitably flow towards and mix with water from connecting [navigable waters]. Secondly, the "Migratory Bird Rule" was the sole basis of regulatory jurisdiction asserted by the [Corps] in SWANCC. With respect to the Defendants' site, however, the government has never invoked the Migratory Bird Rule. Instead, the government seeks to regulate the Site on the theory that it is an "adjacent wetland."

Id.

In United States v. Buday, 138 F.Supp.2d 1282 (D.Mont. 2001), the court, post-SWANCC, upheld the defendant's Clean Water Act conviction where jurisdiction was exercised over his discharge of pollutants into wetlands adjacent to tributaries of navigable waters pursuant to 33 C.F.R. § 328 (a) (1), (5), and (7). The court

noted that Congress could exercise its Commerce Clause power under these subsections because they relate directly to navigability, and that it was the absence of this connection to a channel of interstate commerce that concerned the SWANCC Court. 138 F.Supp.2d at 1288. Accordingly, the Buday court found permissible the Corps' exercise of jurisdiction over the defendant's wetlands, even though they were not connected to a navigable waterway for more than 235 miles, because the pollutants would eventually reach waters affecting interstate commerce. Id. at 1292. In fact, the court went so far as to say:

> [A]ny polluting activity is subject to federal jurisdiction if it impinges on any stream that flows primarily over the surface of the land and empties into a water that is at some point navigable-in-fact. . . . The legislative history, in combination with the cases cited, establishes that Congress intended the Clean Water Act to reach any surface water that contributes to a water that is navigable-in-fact.

Id. at 1289-90.

In Headwaters, Inc. et al. v. Talent Irrigation Dist., the Ninth Circuit found SWANCC inapplicable to the exercise of jurisdiction over irrigation canals which, at least intermittently, exchanged water with streams and creeks. 243 F.3d 526 (9th Cir. 2001). The court refused to extend SWANCC, stating "[t]he irrigation canals in this case are not 'isolated waters' such as those that the [SWANCC] Court concluded were outside the jurisdiction of the Clean Water Act." Id. at 533. The court held that

"[e]ven tributaries that flow intermittently are 'waters of the United States'." Id. at 534.

In support of its holding, the Headwaters court cited United States v. Eidson, the reasoning of which persuaded this Court when it originally found the Deaton Parcel contained jurisdictional wetlands under the Act. Headwaters, 243 F.3d 526, 534 (citing Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997); Corrected M&O at 19-20. In Eidson, the Eleventh Circuit held that a drainage ditch connected to a sewer drain that ran into a canal and eventually led to Tampa Bay was a "water of the United States" under the Act. 108 F.3d at 1342-43. This Court, like the Ninth Circuit and other courts[4], does not agree with the Defendants' conclusion that the reasoning of Eidson and other cases finding jurisdiction over waters not immediately adjacent to navigable waters is called into question by SWANCC.

Unlike the situation with the isolated pond at issue in SWANCC, there is a surface water connection, albeit indirect, between the Deaton Parcel and navigable waters,

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[4] The Headwaters court cites, in further support of its holding, several other pre-SWANCC cases: "[S]ee Driscoll v. Adams, 181 F.3d 1285, 1291 (11th Cir. 1999) (small-volume stream running only intermittently is 'navigable water'); Quivira Mining Co. v. United States Envtl. Prot. Agency, 765 F.2d 126, 130 (10th Cir. 1985) (creeks and arroyos connected to streams during intense rainfall are 'waters of the United States'); [United States v.] Texas Pipe Line Co., 611 F.2d [345, 347 (10th Cir. 1979)] (oil spill into tributary involved 'waters of the United States,' even though there was no evidence that streams that connected the tributary with navigable waters were running at time of spill) . . .". 243 F.3d at 534. Thus, the Ninth Circuit reads SWANCC as limited to its narrow holding and does not regard it as a dramatic curtailing of Corps jurisdiction under the Act.

which was demonstrated in a dye study conducted by Corps ecologist Alex Dolgos. See 2nd Stipulation ¶¶ 5-14; 1st Dolgos Aff. ¶ 6. Like the wetlands in Rueth, "water molecules currently present in the [Deaton] wetlands will inevitably flow towards and mix with water from connecting" navigable waters. No. 2:96-CV-540 at 4. The Defendants' sidecasting activities on their wetlands impinged on water that "flows primarily over the surface of the land and empties into a water that is at some point navigable-in-fact", a fact which was sufficient to convince the Buday court that the defendant's wetlands were subject to regulation under the Act. 138 F.Supp.2d at 1289-90; 1st Dolgos Aff. ¶¶ 2, 4-6, 9. Similarly, this Court's determination that the Corps has jurisdiction over the Parcel was premised on the Parcel's surface water connection, or "adjacency", to the Wicomico River and, ultimately, the Chesapeake Bay. Corrected M&O at 21.

The Defendants contend that their wetlands are not adjacent to waters of the United States because of the roadside drainage ditch immediately adjacent to their wetlands. They claim that the ditch cannot be considered a tributary of any sort but argue that even assuming it is, it is only a tributary of the kind of water described in the now limited § 328.3(a)(3). While the Court agrees that the Defendants' wetlands cannot be considered adjacent to navigable waters according to the plain meaning of "adjacent", the foregoing discussion of the Clean Water Act regulations and interpreting cases makes clear that "adjacent" is not to be restricted to its plain general usage meaning in the context of the Act. If "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'" wetlands, such as those on the Defendants' Parcel, having an actual surface water connection to navigable waters are "adjacent" within the

meaning of the Act. 33 C.F.R. § 328.3(c) (emphasis added).

The Defendants' continued reliance on the "questionable" status of § 328.3(a)(3) is misplaced. It is the surface water connection between the Defendants' wetlands and navigable waters that renders the wetlands "waters of the United States" under the Act by virtue of §§ 328.3 (a)(1), (5), and (7) and § 328.3(c) and thereby gives the Corps jurisdiction in the instant action. Because these provisions are not called into question by SWANCC, the Court will not change its decision on jurisdiction.

2. Wilson

In Wilson, the Fourth Circuit held that 33 C.F.R. § 328.3 (a)(3), which adds to the definition of "waters of the United States" intrastate waters whose degradation could affect interstate commerce, exceeded the Corps' congressional authority to regulate under the Clean Water Act. 133 F.3d 251, 253-54. The Wilson court invalidated the provision because it does not require that the use of the intrastate waters have a substantial impact on interstate commerce or that the covered waters have any sort of nexus with interstate or navigable waters. 133 F.3d at 257. Rather, it triggers Corps jurisdiction if the activity to be regulated merely could affect interstate or foreign commerce. 33 C.F.R. § 328 (a)(3) .

As discussed above, jurisdiction over the Defendants' wetlands is conferred by § 328.3 (a)(1), (5), and (7). The Wilson court's Constitutional concern does not apply to § 328.3 (a)(1), (5), and (7), which, as detailed below, confer jurisdiction pursuant to Congress' authority to regulate channels of interstate commerce. In fact, the Wilson court noted that:

> Presumably, Congress may also regulate the discharge of pollutants into nonnavigable waters to the extent necessary to protect the use or potential use of navigable waters as channels or instrumentalities of interstate commerce, although the extent of that power is not entirely clear.

133 F.3d at 256. Yet the Wilson court specifically declined to answer the very question the Defendants present to this Court. Instead, the Fourth Circuit was careful to circumscribe its decision to construing only § 328.3 (a)(3):

> [W]e need not resolve these difficult questions about the extent and limits of congressional power to regulate nonnavigable waters to resolve the issue before us. The regulation challenged here, 33 C.F.R. 328.3(a)(3) (1993), defines "waters of the United States" to include: All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . . The regulation requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters.

Wilson at 256-57. In contrast, the regulations conferring jurisdiction over the Parcel wetlands require just such a

nexus, namely "adjacency", between the wetlands and navigable or tidal waters, i.e. channels of interstate commerce. See 33 C.F.R. § 328.3(a)(1), (5), (7). Thus, Wilson is not controlling decisional law with respect to jurisdiction in the instant action.

The Defendants seek to extend Wilson's holding to the present case because the facts (the type of wetlands and their proximity to navigable waters) of the two cases are very similar.[5] However, the similarity of the facts does not render Wilson controlling decisional law in the instant action. Wilson therefore provides no basis for the Court to reconsider its previous finding of jurisdiction.[6]

3. Morrison

The Corps' jurisdiction under the Clean Water Act derives from Congress' power to regulate interstate commerce under the Commerce Clause. U.S. Const. art. I, § 8. The Defendants contend that the Supreme Court's modern curtailment of Congress' Commerce Clause powers, beginning with United States v. Lopez, 514 U.S. 549 (1995), and recently clarified by United States v. Morrison, 529 U.S. 598 (2000), renders unconstitutional the Corps' attempt to regulate activity on wetlands that will not have a substantial economic impact on interstate

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[5] The parcels in Wilson contained wetlands, the waters from which "flowed in a drainage pattern through ditches, intermittent streams, and creeks, ultimately joining the Potomac River, a tributary of the Chesapeake Bay." 133 F.3d at 254-55.

[6] The SWANCC Court took a narrower approach than the Fourth Circuit, invalidating only the Migratory Bird Rule and not § 328.3(a)(3) in its entirety, so query whether this aspect of Wilson remains good law in the aftermath of SWANCC. See supra n.2 and accompanying text.

commerce.

In Lopez, the Supreme Court outlined the modern scope of Congress' commerce clause power as follows:

> [There are] three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce ["Prong 1"]. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities ["Prong 2"]. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce ["Prong 3"].

514 U.S. at 558-559 (citations omitted). Prong 3 jurisdiction may be exercised over purely intrastate activities which individually do not effect interstate commerce, but, in the aggregate, the class of activities has a substantial impact on interstate commerce. See Wickard v. Filburn, 317 U.S. 111 (1942). Short of stating that Prong 3 jurisdiction applies only to economic activities, the Morrison Court emphasized the importance of focusing on economic endeavors when aggregating activities to determine whether Prong 3 jurisdiction exists. 529 U.S. at 608-611.

Pursuant to the authority to regulate intrastate activities whose cumulative impact affects interstate commerce, the Corps enacted Clean Water Act regulation

33 C.F.R. § 328(3)(a)(3), which extends the definition of "waters of the United States" under the Act to include:

> All other waters such as intrastate lakes, rivers . . . or naturals ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . .

Id. As § 328.3(a)(3) confers jurisdiction over intrastate waters to the extent that the use of such waters could affect interstate commerce, it clearly derives the kind of Commerce Clause jurisdiction described by Lopez Prong 3. 514 U.S. at 558-559.

The Defendants correctly assert that the SWANCC, Court found that the Migratory Bird Rule exceeded the scope of what Congress may regulate under Lopez Prong 3. SWANCC, 531 U.S. 159, 174. However, jurisdiction is exercised in the instant action under § 328.3 (a)(1), (5), and (7), which derive authority to confer jurisdiction from Lopez Prong 1, i.e. wetlands adjacent to tributaries of channels of interstate commerce. Thus, the Defendants' contention that the sidecasting they conducted on their wetlands did not have a substantial economic impact on interstate commerce, regardless of its merit, is irrelevant to the instant decision. Because Morrison focuses exclusively on Lopez Prong 3 jurisdiction, it is not applicable to this case. 529 U.S. 598. The Constitutional arguments raised by the Defendants thereunder need not and will not be reached.

In sum, while Supreme Court and the Fourth Circuit decisions are certainly controlling over this Court, the precedents established by SWANCC, Wilson, and Morrison cannot be construed as controlling decisional law in the instant case. Thus, the Defendants' Motion for Reconsideration presents no reason to change the decision

or modify the rationale of the Court's September 22, 1997 Memorandum and Order.

III. REMEDY AND PENALTY

A. Remedy

After inspecting the Parcel, the Court finds that the appropriate remedy is to require the Defendants to restore the status quo prior to the offense by replacing the excavated material in the drainage ditch. The Court finds unacceptable the Defendants' proposal that they be permitted to remove the sidecast material from the Parcel. It is doubtful that this removal could be done in an ecologically harmless manner. Even if it could, the net effect of such a "remedy" would be to reward the Defendants with Court sanctioned drainage of protected wetlands and permanent disruption of the environmental status quo.

The Government, in its October 18, 2001 Brief Following Site Visit, states that an ecologically acceptable alternative to refilling the entire ditch on the Parcel would be to order the Defendants only to: 1) backfill fifty to seventy-five feet beginning at Morris Leonard Road; and 2) backfill fifty to seventy-five feet at the point where water coming off the Parker Property enters the Deaton ditch. If this possibility is less burdensome on the Defendants yet does no ecological harm, it will be permitted; however, the Court will not open the door to further litigation. The Court will, therefore, provide in its Order that it will entertain a joint motion to modify the Order so as to permit the Government's suggestion to be effected.

B. Penalty

The Government is, quite appropriately, concerned about the action of the Defendants and the effects upon the environment. Moreover, it is true that, in cases like this one, substantial penalties should be imposed as a deterrent to others who may take their chances on getting caught. Nevertheless, the critical point in the instant case is that the Defendants had a perfectly reasonable argument in support of their position that their actions did not contitute a violation of the Clean Water Act. Indeed, Judge Niemeyer of the Fourth Circuit expressly so held in his decision in Wilson and this Court (while disagreeing with Judge Niemeyer) predicted that the Fourth Circuit would adopt the Defendants' position.

In context, and in recognition of the fact that the Defendants are required to bear the expense of restoring the Parcel to its pre-violation condition, the Court will not impose a penalty on the Defendants.

IV. CONCLUSION

For the foregoing reasons:

1. Defendants' Motion for Reconsideration of the Court's September 22, 1997 decision is DENIED.
2. The Judgment Order issued on September 22, 1997, insofar as it resolves the jurisdictional issue in this matter, remains in effect.
3. The Court shall require, by separate Order, that the Defendants replace the excavated material in the drainage ditch.
4. The Court shall not impose a financial penalty on the Defendants.

5. Judgment shall be entered by separate Order.

SO ORDERED this 29th day of January, 2002.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States Distict Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
Plaintiff	*	
vs.	*	
JAMES S. DEATON AND	*	CIVIL NO. MJG 95-2140
REBECCA DEATON	*	
Defendants.	*	

...o0o...

REMEDIAL ORDER

For the reasons set forth in the Memorandum and Order issued January 29, 2002:

1. Defendants James S. Deaton and Rebecca Deaton shall restore the property at issue, Parcel 117 on Wicomico County Tax Map 31, to its pre-violation condition and elevation by replacing in the drainage ditch thereon the material which was removed and sidecast on the said property by them and/or their agents;

2. This restoration shall be accomplished with all reasonable expedition but in no event later than 6 months from the effective date of this ORDER and, subject to the approval of the Army Corps of Engineers, in compliance with all pertinent legal and regulatory requires, which approval shall not be unreasonably withheld;

3. Work pursuant to this ORDER may include cutting trees which have grown up on the spoil piles and planting annual rye for stabilization, as necessary.

SO ORDERED This 4th day of February 2002.

/s/ Marvin J. Garbis
Marvin J. Garbis
United States District Court Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 11, 2003

No. 02-1442
CA-95-2140-MJG

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES S. DEATON; REBECCA DEATON,
Defendants-Appellants,

THE CHESAPEAKE BAY FOUNDATION, INCORPORATED; STATE OF MARYLAND, DEPARTMENT OF THE ENVIRONMENT,
Amici Supporting Appellee.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor
Clerk

APPENDIX E

I. Pertinent Provisions of the Clean Water Act.

(33 U.S.C.A. §§ 1251 to 1387)
CHAPTER 26-WATER POLLUTION PREVENTION AND CONTROL

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* * *

§ 101(a), (b), 33 U.S.C. § 1251(a), (b) (2003)

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic

pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

Congressional declaration of goals and policy
(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the

policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

§ 301(a), 33 U.S.C. § 1311(a) (2003)

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * *

§ 404(a), 33 U.S.C. § 1344(a) (2003)

Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * *

§ 502(6), (7), (12), (14), 33 U.S.C. § 1362(6), (7), (12), (14) (2003)

Definitions

Except as otherwise specifically provided, when used in this chapter:

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

• • •

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

• • •

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

• • •

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well,

discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * *

II. Pertinent Federal Regulations

33 C.F.R. § 328.3 (a), (c) (2003)

Definitions

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

i. Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

ii. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

iii. Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with the EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

• • •

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

33 C.F.R. § 328.4 (2003)

Limits of jurisdiction.

(a) Territorial Seas. The limit of jurisdiction in the territorial seas is measured from the baseline in a seaward direction a distance of three nautical miles.

(b) Tidal Waters of the United States. The landward limits of jurisdiction in tidal waters:

(1) Extends to the high tide line, or

(2) When adjacent non-tidal waters of the United States are present, the jurisdiction extends to the limits identified in paragraph (c) of this section.

(c) Non-Tidal Waters of the United States. The limits of jurisdiction in non-tidal waters:

(1) In the absence of adjacent wetlands, the jurisdiction extends to the ordinary high water mark, or

(2) When adjacent wetlands are present, the jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.

(3) When the water of the United States consists only of wetlands the jurisdiction extends to the limit of the wetland.

* * *

APPENDIX F

I. Pertinent Articles of the Maryland Code

Article 8. Soil Conservation

Section 603(b). Agricultural drainage projects.

The General Assembly determines and finds that the lands and waters comprising the watersheds of the State are great natural assets and resources. It continues to find that the drainage of surface waters from lands for agricultural purposes by public drainage associations represents a public benefit. The General Assembly further finds that agricultural drainage projects, if not properly designed, operated, and maintained, have the potential to contribute nonpoint source pollutants to the waters of the State.

* * *

Article 25. County Commissioners Draining Lands

Section 52. Establishment of Public Drainage Associations. (a) The boards of county commissioners of the several counties in the State of Maryland shall have jurisdiction, power, and authority to establish public drainage associations in their respective counties, and to locate and establish ditches, drains, or canals, and to cause to be constructed, straightened, widened or deepened any ditch, drain or watercourse for the purpose of establishing and maintaining watershed drainage systems, and it is hereby declared that such drainage shall be considered a public benefit and conducive to the public health, convenience and welfare.

(b) The State Secretary of Agriculture and the State Soil Conservation Committee shall be notified of any establishment of a drainage association so that coordination and assistance may be provided in accordance with § 8-602 of the Agriculture Article.

(c) The provisions of this subtitle apply in those counties having a charter form of government under Article XI-A of the Constitution, with the term "county council" being

substituted in each instance in this subtitle for the term "county commissioners". The provisions of this subtitle apply in those counties having adopted code home rule under Article XI-F of the Constitution.

(d) The provisions of this subtitle do not restrict a chartered or code county from exercising those powers granted in Article 25A, § 5(G) of the Code and Article 25B, § 13 of the Code, which do not conflict with this subtitle.

Section 53. Petition to establish. (a) A petition signed by not less than one third of the landowners or by the owners of not less than one third of the land in a watershed may be filed with the clerk of the board of county commissioners of the county in which all or any part of such body of land is located, describing the area in such a way as to convey an intelligent idea of its location, boundaries and the need of drainage for optimal crop production and that the public benefit or utility, or the public health, convenience or welfare would be promoted by draining or ditching the same, or by changing or improving the natural watercourses, and asking for the establishment of a public drainage association for such purposes.

(b) The petition shall be accompanied by a report from the local soil conservation district or districts lying in whole or in part within the proposed association which shall show the following:

(1) The size and location of the proposed drainage association;

(2) The nature of the problem;

(3) The type of treatment believed needed and the benefits anticipated;

(4) Whether the proposed public drainage association is practicable and feasible and is generally supported by the landowners in the area;
(5) Whether it will promote the public benefit, and be conducive to the public health, safety, and welfare;
(6) The name of the proposed organization shall be styled the "_____ Public Drainage Association"; and
(7) The number of managers, not less than three to serve as the governing body.

The soil conservation district or districts shall file, with the report, maps, which shall show a general delineation of area affected, together with its location in the county or counties indicated.

* * *

II. Pertinent Maryland Regulations

Title 15. Section 20.01.01.

These regulations establish the requirements for the design, construction, operation, and maintenance of agricultural drainage projects that are financed or managed by public drainage associations. To the maximum extent practicable, these regulations assure protection of natural resources and prevent water pollution by non-point source pollutants associated with agricultural drainage projects.

* * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
Plaintiff	:	
vs.	:	CIVIL ACTION NO. MJG-95-2140
JAMES S. DEATON, et al.	:	
Defendants	:	

...oOo...

SIXTH AFFIDAVIT OF ALEXANDER G. DOLGOS

I, Alexander G. Dolgos, being duly sworn, do state as follows:

1. I am an Ecologist employed in the United States Army Corps of Engineers, Baltimore District, assigned to the Eastern Shore Enforcement Office. I have previously provided affidavits in this case and incorporate my qualifications from those prior affidavits as if stated herein.

2. At the suggestion of Mr. Smethurst, I am filing this affidavit to authenticate photographs taken during the dye test done in May 1996.

3. In my first affidavit I described the dye test in this case as follows:

> On May 18, 1996, another authorized entry on the Deaton property was made. The purpose of this entry was to dye trace the flow of the stream located on the property. I was assisted by Jerry Crutchly, an Environmental Protection Specialist with EPA Region III, and Doug Parker, Special Agent EPA CID.
>
> At 8:18 a.m., Mr. Crutchly placed non-toxic

tracing dye in the headwater stream at the location of well number 20, as depicted on the May 17, 1996 site survey plan. See Attachment 15, Defendants Site Survey Plan. Well #20 is located upstream of the unauthorized work. The dye was followed by visual observation and was photographed. Additional dye was added to the plume as necessary to maintain a detectable level for observations and photography.

The dye plume flowed downstream reaching the confluence with the manmade ditch at 9:47 a.m. The flow and dye continued downstream in the ditch and flowed under Morris Leonard Road through the existing culvert at 10:24 a.m. The plume continued downstream along the western side of Morris Leonard Road in a northerly direction. This stream channel is now part of the Public Draining Association (PDA). At 12:17 p.m., the plume reached the point were the channel turns west away from the road and flows across the agricultural fields. At 1:24 p.m., the plume reached the point where the Perdue Creek channel turns back in a northern direction. The plume continued downstream reaching the Beaver Dam Creek at 4:16 p.m. Beaver Dam Creek flows directly into the Wicomico River, a tidal tributary of the Chesapeake Bay. The stream flowed the entire length of Perdue Creek within the banks of a defined channel.

Review of other documents and photographs indicates that this dye test was actually performed on May 17, 1996.

4. The attached photographs, numbered 40- 54, were taken during the aforementioned dye test, at the

approximate locations indicated on the maps attached as Attachments 1 and 2. These photographs are fair and accurate depictions of the dye test as it appeared on May 17, 1996. On these same maps, Attachments 1 and 2, I have also indicated the approximate location of the photographs numbered 1-33, which photographs are attached to the Second Stipulation.

I hereby swear under penalty of perjury that the foregoing is true and correct, this 16th day of October 2001.

[ATTACHED EXHIBITS NOT REPRODUCED]

/s/ Alex G. Dolgos
Alexander G. Dolgos

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
Plaintiff	:	
v.	:	CIVIL NO. MJG-95-2140
JAMES S. DEATON AND REBECCA DEATON,	:	
Defendants.	:	

...oOo...

SECOND STIPULATION

The Parties to the above matter, in an effort to resolve factual disputes so that a final judgment may be entered, hereby agree and stipulate to the following facts in this case:

1. For the purposes of this stipulation (and without prejudice to Defendants' appellate rights) the parties accept the Court's prior rulings on the definitions of "saturated to the surface" and "growing season." For the purposes of this stipulation, the expression "shallow groundwater" means water within 12 inches of the surface. Since the parties do not agree on whether certain water filled depressions are "ditches", "channels", "watercourses" or "streams", this stipulation will use these terms interchangeably to describe any water filled depression containing flowing water for at least part of the year.

2. The Delmarva peninsula (incorporating Delaware and the eastern shores of Maryland and Virginia) exhibits a low, flat topography. In many areas, including within the

conditionally stipulated wetlands Deaton property[1], shallow groundwater on the peninsula rises and falls in a predictable seasonal pattern, rising to or close to the surface in the late Winter (January-February) and then falling off to lower levels in the late Spring through the Fall. When adjacent, some of this shallow ground water discharges into nearby ditches or streams.

3. The ditches/ channels along Morris Leonard Road have been there since at least the 1940's and probably were constructed when Morris Leonard Road was a dirt road. The Beaverdam Public Drainage Association (PDA) was not formed until the late 1960's. Prior to that time agricultural ditching in the area was part of an effort to drain farm fields and lower the groundwater table. Such ditching and draining was necessary in some areas because the soil conditions were sometimes too wet in the Spring for the planting or cultivating of crops.

4. Surface water and shallow ground water flows down gradient from the Parker property to the Deaton property. The source of the surface water flowing onto the Deaton property is a combination of groundwater and rainwater. This surface flow varies with fluctuations in annual and seasonal groundwater and rainfall, with greater frequency and volume generally occurring in the period from January to May. The relative contributions to this surface flow from shallow groundwater or rainfall also varies with groundwater levels and rainfall.

5. Prior to the construction of the ditch excavated by the Deatons in 1990 (the "Deaton Ditch"), this surface and shallow groundwater flowing onto the Deaton property

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[1] The Parties have conditionally stipulated that the area between the ponded area and Morris Leonard Road was a wetland as described in the Attachment to the First Stipulation.

moved down gradient across the Deaton Property toward Morris Leonard Road. In the winter months, some of it ponded in a low area in the middle of the property. Some of it may have discharged down gradient into the roadside ditch either as shallow groundwater or sheet flow from the ponded area.

6. The roadside ditch along Morris Leonard Road has a defined bed and bank for most of its length.

7. The drainage ditch along Morris Leonard Road begins near Parsonsburg, approximately 2,350 feet to the southeast of the western corner the Deaton Property and the bend in Morris Leonard Road. At this point, it is not really a ditch but rather a shallow (6" - 8") swale that is not more that two feet wide. The "ditch" proceeds in a northwesterly direction getting slightly deeper and wider. At the property of Gary Nock (Parcel 423), it is perhaps three feet wide. Halfway across the Nock lot it enters a buried 14-inch culvert which continues across the balance of the Nock lot and across the developed portion of the Alfred Scrivo lot (Parcel 37). At the terminus of the culvert, the ditch is about four feet wide and when observed on October 22, 1996 by John Andrews, contained water having a depth of three inches.

8. As the ditch passes in front of the Deaton property (Parcel 117), it has a bottom width of two - three feet and when observed on October 22, 1996 by John Andrews a water depth of three-to-four inches.

9. Surface water from the Parker Property flows approximately 200 feet through an area containing wetland ferns and trees and into a 100-foot long, old, degraded man-made ditch approximately 1 foot deep and 1 foot wide which continues in a wetland swale down gradient to the Deaton property. This flow continues on the Deaton

property via swale down-slope approximately 400 feet from the Deaton property boundary until it is intercepted by the ditch the Deatons excavated in 1990, and then flows west and then south to join the ditch described in paragraphs 7 and 8.

10. Water from both ditches flows through an 18-inch, metal culvert under Morris Leonard Road to a county roadside drainage ditch adjacent to the John Adkins farm (parcel 5) having a bottom width of 3.5 feet and, when observed on October 22, 1996 by John Andrews, a water depth of 4-7 inches. The ditch continues around a turn in Morris Leonard Road where it empties into a larger ditch with a bottom width of 5.5 feet identified as the John Adkins Prong of the Beaverdam PDA. The PDA ditch continues for about 1700 feet along the southerly side of Morris Leonard Road (having a water depth 4-7 inches on October 22, 1996) until it reaches a point about 700 feet west of the entrance lane to John Adkins farm.

11. There the ditch turns 90 degrees and passes through farm fields belonging to Mr. Adkins. The ditch becomes wider and deeper after it again turns 90 degrees to the west and eventually crosses the John Speake and Lewis Riley farms. At the point where it crosses under the private dirt road running from Morris Leonard Road south through the Speake and Riley farms to Maryland Route 376 (Old Ocean City Road) it is 12 feet wide and approximately 8-10 feet deep, although the water depth when observed on October 22, 1996 by John Andrews was nine inches. From there it continues with approximately the same dimensions until it empties into Beaverdam Creek approximately 1320 feet to the west.

12. Beaverdam Creek is a naturally occurring, perennial, non-navigable stream that begins northwest of Parsonsburg just south of Dagsboro Road and flows in a

south-southwesterly direction under Morris Leonard Road, intersects Perdue Creek, and crosses under Old Ocean City Road (Md. Route. 346), Walston Switch Road and U. S. Route 50. The portion of the creek from just above Morris Leonard Road to just south of Md. Route 346 was channelized in the late 1960's as part of the Beaverdam PDA project.

13. After passing under U. S. Route 50, Beaverdam Creek continues to flow in a southwesterly direction until it reaches the dam at Hobbs Road where there is a privately owned and maintained pond. The creek crosses under Hobbs Road and Mt. Herman Road (Md. Route 350) and discharges into Parker Pond. The water in Parker Pond flows over the dam at North Schumaker Drive. From there water flows westerly to Shumaker Pond and the dam at Beaglin Park Drive owned and maintained by the City of Salisbury. From there, water flows northwesterly through Salisbury's municipal park and zoo to a city-maintained dam at Beaverdam Drive. Below the dam, the watercourse, although non-tidal, is known as the East Branch of the Wicomico River, and it flows westerly to a dam on the east side of Snow Hill Road (Md. Route 12).

14. Below the last-mentioned dam, the Wicomico River is tidal and, west of Business U. S. Route 13, navigable in fact. Approximately 25 miles downstream, the river empties into Tangier Sound and the Chesapeake Bay.

15. Perdue Creek is a naturally occurring stream. It is shown as an intermittent stream crossing Morris Leonard Road on the 1942 (Rev. 1946) and 1983 U.S.G.S. quadrangle maps of the area; approximately 3/4 mile downstream from Morris Leonard Road, Perdue Creek is depicted as a blue line (perennial) stream. On the 1905 and 1992 U.S.G.S. quadrangle maps of the area, Perdue Creek is depicted as an blue line (perennial) stream crossing

Morris Leonard Road.

16. Beaverdam Creek is a naturally occurring stream that is depicted on the 1905, 1942 (Rev. 1946), 1983 and 1992 U.S.G.S. quadrangle maps as a perennial (blue line) stream at the point that Perdue Creek enters.

17. The 1942 (Rev. 1946) and 1983 U.S.G.S. quadrangle maps of the area depict an intermittent stream flowing through the Deaton Property; the 1905 and the 1992 U.S.G.S. maps do not.

18. The differences in the way stream heads are depicted on these U.S.G.S. maps may be the result of several mapping conventions and policies. To begin with, stream classification features on U.S.G.S. maps are based on subjective criteria and limited observations. No scientific measurements are made to classify streams or intermittent streams drawn on U.S.G.S. maps. The U.S.G.S. maps do not purport to identify "waters of the United States", jurisdictional wetlands or all surface water connections between wetlands and downstream waters. Actual wet areas may be greater than those shown on these maps because USGS generally maps these areas based on the driest season of the year.

19. Newer U.S.G.S. mapping policies and standards adopted in 1973 and 1980 exclude first-order, intermittent streams of less than 2,500 ft. in length. The 1983 U.S.G.S. map was "photorevised" from the 1942 map to update cultural features, such as buildings and roads, and did not redraw physical features such as streams. Therefore, the new mapping policies and standards in effect in 1983 would not have affected the appearance of streams on the 1983 U.S.G.S. map (i.e. the existing stream lines would simply be recopied onto the new map). However, the 1992 map would reflect the 1973 and 1980 policy changes. The

result is that if there was an intermittent stream on the Deaton property it would not be reflected on the 1992 U.S.G.S. map.

20. Attached to and made a part of this stipulation are the following:

A. Photographs numbered 1 through 33 most of which were taken on September 14, 2001, the date of the Court's site visit.

B. Index To Photographs describing each of the 33 photographs.

C. Map from the Salisbury Chamber of Commerce on which are indicated the points at which photographs 11-33 were taken.

D. Map showing the general locations described in paragraphs 7 through 16 of this stipulation.

DATED this 12th day of October, 2001.

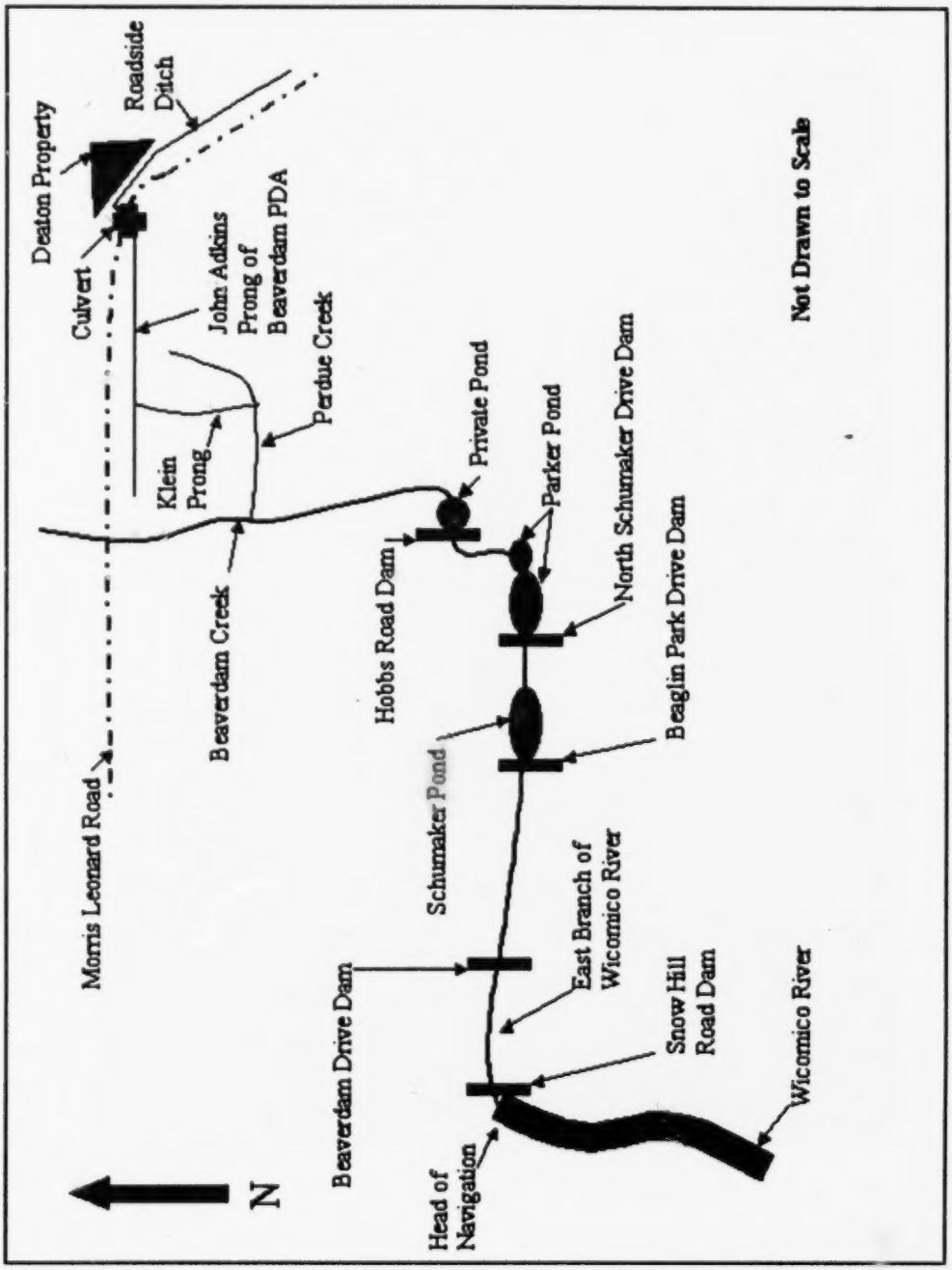
/s/ James C. Howard
James C. Howard
Assistant United States Attorney

/s/ Raymond S. Smethurst, Jr.
Raymond S. Smethurst, Jr.
Attorney For Defendants

[ATTACHED EXHIBITS NOT REPRODUCED]

APPENDIX I

Depiction of Connections between Deaton Property and Wicomico River, from Reply Brief of Appellants September 13, 2002



APPENDIX J

Photograph of Roadside Ditch Next to Morris Leonard Road, Attached to Affidavit of Amanda L. Longfellow, Oct. 15, 2001